Exxon Chemical Company *and* Teamsters Local 877.

Case 22–CA–23546

September 29, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

On March 28, 2001, Administrative Law Judge Howard Edelman issued the attached decision. The Respondent filed exceptions and a supporting brief. The Charging Party filed an answering brief to the Respondent's exceptions.[1] The Respondent filed a reply brief to the answering briefs of the Charging Party and the General Counsel.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.

This case which arises in the context of the winding down of the Exxon Chemical Company, involves the Union's request to arbitrate grievances that arose during the life of the collective-bargaining agreement. The Respondent refused to arbitrate. The primary issue, as specifically alleged in the complaint, is whether the Respondent violated Section 8(a)(1) and (5) of the Act when it refused to designate an arbitrator pursuant to the procedures set forth in the collective-bargaining agreement and refused to arbitrate the grievances. We adopt the judge's decision and find that the Respondent violated the Act as alleged.

The last collective-bargaining agreement between the Respondent and the Union was effective from March 2, 1996 to June 1, 1999. It contained, inter alia, a grievance-arbitration clause covering any "claim . . . that the Company has violated an express provision of this Agreement." The collective-bargaining agreement provided that grievances must be presented within 30 days after the alleged violation occurs. The agreement also contained a provision for notice and severance pay in the event of layoff, and the following provision entitled "Company Benefit Plan:"

> This Agreement does not affect the Exxon Benefit Program (a. Thrift Plan . . .), or the Exxon Chemical Benefit Program (a. Thrift Plan . . .), or the administration thereof. This provision, however, is not a waiver of such rights as the Union has to bargain concerning these programs.

Around July 1996, the Respondent announced that it would be forming a joint venture, later named Infineum. Throughout the following 2 years, the Respondent and the Union participated in extensive effects bargaining related to this decision. From July 1996 though October 1998, the Union filed numerous grievances and unfair labor practice charges relating to the formation of the joint venture.[3] On November 24, 1998, the Respondent and the Union signed a non-Board settlement agreement, resolving all then-pending grievances and unfair labor practice charges.[4]

Infineum, formed by the joint venture, became operational on January 1, 1999.[5] The last day that the unit employees were employees of the Respondent, and the day that they received their last paycheck from the Respondent, was December 31, 1998. In its grievances filed on January 30, the Union contends that as of that date, the Respondent had not provided the employees with the contractually required 6-month notice of layoff, had failed to match a contribution to the employees' thrift fund based upon the severance pay, and had unilaterally decided to transfer the Exxon thrift fund to the Infineum thrift fund.[6]

On January 29, Union Trustee and Chief Spokesman Albert DeFreece telephoned the Respondent's labor relations manager, William Goodhart, to inform him that the Union was going to file three grievances concerning

[1] The General Counsel also filed an answering brief, but it was untimely and consequently was not forwarded to the Board for its consideration.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] The judge found that, at no time during effects bargaining and grievance processing did the parties discuss the possibility of terminating their bargaining agreement or contractual grievance-arbitration procedures.

[4] Par. 6 of the parties' settlement agreement states:

> The Union agrees to withdraw with prejudice all pending Unfair Labor Practice charges and grievances relating to the formation of INFINEUM (as set forth in the attached list, which the Union certifies is a complete accounting of all outstanding claims relating to the formation of INFINEUM initiated by the Union as of this date). The Union further agrees not to initiate or reinstitute these or substantially similar claims against Exxon in any forum whatsoever.

[5] All dates hereafter are 1999 unless otherwise indicated.

[6] The transfer to the Infineum thrift fund was implemented in March 1999.

these matters. Goodhart responded to DeFreece by saying, "send me the grievances and I'll take a look at them." The Union formally filed the three grievances by letter dated January 30,[7] which specifically asked for a response to the grievances. The Respondent did not respond.

On March 26, DeFreece sent another letter to Goodhart, restating the three grievances and requesting that the Respondent designate a contact with whom the Union could communicate to facilitate the selection of arbitrators and the scheduling of hearings. By letter dated April 29 to DeFreece, Goodhart asserted for the first time, without explanation, that all three grievances were untimely, notwithstanding that the Union presented its grievances within 30 days, as required by the collective-bargaining agreement. In addition, Goodhart claimed that one of the grievances was in violation of the settlement agreement and that the Union had waived its right to make the claims contained in the other two grievances. Goodhart also failed to respond to the Union's request that the Respondent designate a contact person for the selection of arbitrators.

By letters to Goodhart, dated May 12, DeFreece again requested arbitration of the grievances and requested that Goodhart make the usual arrangements to select arbitrators. He asked Goodhart to contact him regarding these matters. Goodhart did not respond.

Lacking a response from the Respondent, on June 16 the Union submitted the three grievances to the American Arbitration Association (AAA) for arbitration. On July 2, the Respondent sent a letter to the AAA contending that the grievances were not arbitrable. It further asserted that the parties had a contractual process for selecting arbitrators. On August 2, the AAA notified the parties that it lacked authority to administer arbitrations between the parties.

On August 2, the Union made its final written request that the Respondent designate the arbitrators and submit the grievances to arbitration. By letter dated August 10, the Respondent restated, but did not further explain, its position that the grievances were not arbitrable. The Union filed this unfair labor practice charge on September 1.

Analysis

The judge found that the Respondent violated Section 8(a)(5) of the Act by refusing to designate an arbitrator pursuant to the procedures set forth in the collective-bargaining agreement and by refusing to arbitrate the grievances. We agree because the Respondent's conduct amounted to a complete repudiation of the contractual grievance-arbitration provision.

The Respondent asserts procedural challenges to the judge's decision. The Respondent contends that the Board lacks jurisdiction over it and that the charge is barred by the statute of limitations established in Section 10(b) of the Act. Relying on the expired collective-bargaining agreement, discredited evidence regarding when the Respondent notified the Union of its decision not to arbitrate, and the parties' 1998 agreement settling previously filed grievances, the Respondent contends, as it did before the judge, that the instant grievances are "untimely."[8] Further, the Respondent contends that the judge violated its due process rights by refusing to permit the introduction of evidence related to grievances settled in 1998. As for the merits, the Respondent admits that it did not agree to the Union's request to select an arbitrator and proceed to arbitration, but it characterizes its refusal as a refusal to arbitrate a class of grievances. Citing *Velan Valve Corp.*, 316 NLRB 1273, 1274 (1995), the Respondent contends that its refusal to arbitrate is thus not unlawful.

We find no merit in the Respondent's challenge to our jurisdiction. Further, we find no merit in the Respondent's remaining exceptions.

Jurisdiction

The Respondent has excepted to the judge's finding that the Respondent was engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. On careful examination of the judge's decision and the record, we are satisfied that the Respondent's contention is without merit. Therefore, we assert jurisdiction over the Respondent, as we have done in prior decisions.[9]

Section 10(b)

As noted, the Respondent contends that the complaint in this case is barred by Section 10(b) of the Act. The Respondent alleges, without record support, that it notified the Union, in a January 29 telephone conversation, that it would not designate an arbitrator and arbitrate the grievances. The charge was filed on September 1. The record shows that the Respondent first informed the Un-

[7] (a) Grievance C-001-99—Respondent failed to provide the employees with the requisite 6 months of notice of layoff.
(b) Grievance C-002-99—Respondent failed to match the thrift fund contribution on the severance pay received by the employees.
(c) Grievance C-003-99—Respondent unilaterally decided to transfer the Exxon thrift fund to the Infineum thrift fund.

[8] As shown, the formal filing of the grievances on January 30 (preceded by a telephonic notification on January 29) was within the 30-day contractual deadline. The Respondent has not argued to the contrary.

[9] *Exxon Co. USA*, 321 NLRB 896 (1996); *Exxon Research & Engineering Co.*, 317 NLRB 675 (1995); *Exxon Co. USA*, 315 NLRB 952 (1994); *Exxon Co. USA*, 313 NLRB 1193 (1994); and *Exxon Chemical Co.*, 307 NLRB 1254 (1992).

ion that it was not willing to select arbitrators or arbitrate the grievances on April 29, when it claimed that the grievances were untimely. This notification occurred within 6 months of the filing date of the charge. Accordingly, we adopt the judge's finding that the complaint is not barred by Section 10(b) of the Act.

Section 8(a)(1) and (5)

The judge found, and we agree, that the Respondent violated Section 8(a)(1) and (5) of the Act by refusing to select an arbitrator and refusing to proceed to arbitration over grievances filed by the Union and covered by the grievance-arbitration provisions of the collective-bargaining agreement.

An employer's refusal to designate an arbitrator and arbitrate grievances, pursuant to a collective-bargaining agreement, violates Section 8(a)(1) and (5) of the Act, if the employer's conduct amounts to a unilateral modification or wholesale repudiation of the collective-bargaining agreement.[10] We agree with the judge, under the circumstances of this case, that by refusing to arbitrate the Union's grievances, the Respondent has repudiated its bargaining agreement with the Union.

It is undisputed that a bargaining agreement was in effect on December 31, 1998, the Respondent's last day of operations. As shown, that agreement contained a grievance-arbitration provision and provisions governing layoffs, severance pay, and employee benefit plans, including the thrift fund.

The Union's grievances alleged the Respondent's failure to honor contractual severance pay and notice-of-layoff requirements, and its unilateral decision to transfer employee funds from the Exxon thrift plan to the Infineum thrift fund. The Respondent's alleged conduct was evident to the Union after employees received their final paychecks on December 31, 1998. These grievances implicated a range of contractual issues, not a narrow class of issues, and constituted the totality of collective-bargaining issues pending between the parties. Clearly, as the judge found, the grievances arose under the bargaining agreement and are covered by the grievance-arbitration provision. Thus, the Respondent was under an obligation to submit these grievances to arbitration.[11] It failed to satisfy its obligation. Under these circumstances, by refusing to arbitrate *any* of the grievances that had arisen during the life of the bargaining agreement, the Respondent unilaterally abandoned or repudiated the contractual grievance-arbitration procedure, thereby refusing to bargain with the Union in violation of Section 8(a)(5).[12]

We find this case distinguishable from *Velan Valve Corp.*, 316 NLRB 1273 (1995), and similar cases, cited by the Respondent, where the Board found no violation of Section 8(a)(1) and (5). In those cases, the employer's refusal to select an arbitrator and arbitrate grievances occurred in the context of an ongoing bargaining relationship and was limited to a particular grievance or "narrow class" of grievances. Here, in contrast, the Respondent refused to arbitrate three grievances, each concerning a different provision of the bargaining agreement and together representing the universe of bargaining issues still pending between the parties at the end of their relationship. Additionally, in *Velan Valve Corp.*, supra at 1274, the Board emphasized that the employer, at the time of its refusal to arbitrate grievances, reassured the union of its commitment to the collective-bargaining agreement and to good-faith dealing with the union. The Respondent here provided no such assurances. Rather, it repeatedly ignored the Union's requests to respond to the Union's arbitration requests.

Once the Board has determined that the parties are obligated to submit the subject matter of a dispute to arbitration, as we have here, matters of contract interpretation and procedural questions which grow out of the dispute and bear on its final disposition must be left to the arbitrator.[13] The remainder of the Respondent's exceptions raises such questions. They are not dispositive of

[10] *Beverly Farm Foundation*, 323 NLRB 787, 796 (1997); *McDaniel Ford*, 322 NLRB 956, 965 (1997); *Richmond Convalescent Hospital*, 313 NLRB 1247, 1259 (1994); *3 State Contractors*, 306 NLRB 711, 715 (1992); *Indiana & Michigan Electric Co.*, 284 NLRB 53, 59–60 (1987); *Paramount Potato Chip Co.*, 252 NLRB 794, 796–797 (1980).

[11] *Nolde Brothers v. Bakery Workers*, 430 U.S. 243 (1977); *Indiana & Michigan Electric Co.*, supra at 54–55, 59–60; *Nicholas County Health Care Center*, 331 NLRB 970, 989 (2000); *CBC Industries*, 311 NLRB 123, 128 (1993). See generally *AT&T Technologies Inc. v. Communication Workers of America*, 475 U.S. 643, 650 (1986), quoting *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582–583 (1960) (presumption of arbitrability exists where bargaining agreement contains an arbitration clause, and only the most forceful evidence of exclusion will overcome the presumption).

[12] *Indiana & Michigan Electric Co.*, supra at 54. Here, as in *Indiana & Michigan*, the parties' grievance-arbitration provision contained a reservation of the company's right to participate in a grievance-arbitration without waiving its right to "take the position that a claim is not a grievance." Thus, the Respondent was free to participate in the arbitration and yet adhere to its initial position regarding the merits of the grievances. Therefore, the Respondent could have selected arbitrators and proceeded to arbitration without "surrender[ing] to an entity with the authority to issue a final and binding decision." It could have adhered, before the arbitrator, to its position that the grievances were not arbitrable "if it remain[ed] unconvinced by the facts and arguments brought out in the course of the grievance procedure." Id., citing *Newspaper Printing Corp.*, 221 NLRB 811, 820 (1975).

[13] *John Wiley & Sons v. Livingston*, 376 U.S. 543, 557 (1964); *Steelworkers v. Warrior & Gulf Navigation Co.*, supra; *Steelworkers v. American Mfg. Co.*, 363 U.S. 363 (1960) (only the arbitrator may examine potential merits of claims underlying an arbitrable grievance).

the 8(a)(5) allegations of the complaint, i.e., the refusal to select an arbitrator and proceed to arbitration.

First, the Respondent asserts that the unfair labor practice charge, to the extent that it seeks to compel arbitration of union grievances regarding notice of layoff[14] and severance pay,[15] was filed in violation of the parties' November 1998 settlement agreement. In essence, the Respondent contends that, by entering into an agreement settling grievances and unfair labor practices arising in the aftermath of the Respondent's announcement of a joint venture and during effects bargaining, the Union waived its right to file these two subsequent grievances and is estopped from raising them now. As the judge correctly explained, issues of waiver and estoppel are procedural and must be determined by the arbitrator.[16]

The Respondent also contends that the benefit funds provision of the parties' bargaining agreement expressly excludes from arbitration the Union's grievance regarding the Respondent's transfer of the thrift fund accounts.[17] Again, this is a contract-interpretation issue to be determined by the arbitrator.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Exxon Chemical Company, Newark, New Jersey, its officers, agents, successors, assigns, and representatives, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

"(a) Failing to comply with the collective-bargaining agreement with the Union by refusing to bring to arbitration the grievances filed by the Union."

2. Substitute the following for paragraph 1(b).

"(b) In any like or related manner, interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act."

3. Substitute the following for paragraph 2(b).

"(b) Mail, at its own expense, a copy of the attached notice marked "Appendix"[18] to all former employees who were laid off as a result of the Respondent's cessation of operations. Such notice shall be mailed to the last known address of each employee. Copies of the notice, on forms provided by the Regional Director or Region 22, after being signed by the Respondent's authorized representative, shall be mailed within 14 days after service by the Region."

4. Substitute the following notice for that of the administrative law judge.

Dated, Washington, D.C. September 29, 2003

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Wilma B. Liebman, Member

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Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN BATTISTA, dissenting in part.

I do not agree that Respondent's refusal to designate an arbitrator and to proceed to arbitration on three specific grievances violated Section 8(a)(5) of the Act.

Section 8(a)(5) and 8(d) proscribe an untimely "termination or modification" of a contract. It does not proscribe a mere breach of contract.[1] Thus, if an employer repudiates an entire contract, or clauses of a contract, the employer has violated the Act. For example, if an employer takes the position that it will no longer abide by the arbitration provisions of a contract, that conduct would be unlawful under Section 8(a)(5)and 8(d) of the Act. By contrast, if an employer does not take this position, but rather contends that specific grievances are not arbitrable, that conduct is not a termination or modifica-

[14] Grievance C-001-99. The Respondent excepts to the judge's "finding" that the Respondent "gave improper notice of layoff." Whether or not the Respondent did so is a question raised by the Union's grievance and will be determined by the arbitrator. To the extent that the judge intended this statement as a finding of fact, we do not rely on the statement.

[15] Grievance C-002-99.

[16] The Respondent excepts to the judge's refusal to allow it to introduce evidence relating to the 1996-October 1998 grievances and unfair labor practice charges that were settled in November 1998. The Respondent attempted to adduce evidence related, inter alia, to the timeliness and merits of those earlier, settled grievances to demonstrate that the current grievances were encompassed within the November 1998 settlement. The Respondent contends that the judge thus denied its due process right to a full and fair hearing. We find no merit in these exceptions. The effect, if any, of the 1998 settlement agreement is a determination to be made by the arbitrator. As we have found, the grievances arose under and are covered by the parties' bargaining agreement and, accordingly, must be processed to arbitration. The judge properly limited the scope of the evidence in this case to matters raised in the unfair labor practice complaint, i.e., the Respondent's failure to arbitrate the instant grievances. The judge thus permitted the Respondent to cross-examine the General Counsel's witness regarding the timeliness of this unfair labor practice charge under Sec. 10(b) of the Act.

[17] Grievance C-003-99.

[18] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] *NCR Corp.*, 271 NLRB 1212 (1984); *Thermo Electric Corp.*, 287 NLRB 820 (1987).

tion of the contract.[2] It is only a breach of contract (assuming that the employer's contractual contention has no merit).

The instant case falls within the latter category. Respondent has not abrogated the arbitration provisions of the contract. Rather, Respondent has refused to arbitrate three grievances. Respondent argues that the specific grievances were not arbitrable because: (1) they were filed after the expiration of the contract; (2) they were subsumed under a prior settlement; (3) the thrift plan and the grievance related thereto were not covered by the expired contract. I do not say that these contractual arguments are meritorious. Rather, I say only that they are specific challenges to three grievances, rather than a repudiation of grievance-arbitration provisions of a contract. Accordingly, under the cases cited supra, the foregoing matters are contract interpretation issues for a court to resolve under Section 301, and/or for an arbitrator. They are not matters for the Board under Section 8(a)(5). Thus, they should have been taken to arbitration, rather than brought as charges before the National Labor Relations Board.

My colleagues say that the three grievances constituted "the universe of bargaining issues still pending between the parties." Assuming that this is so, it does not change the result. That is, the fact that all other matters have been resolved by the parties does not transform the remaining controversy as to the three grievances into a wholesale repudiation of the arbitration provisions of the contract.

Finally, my colleagues say that the Respondent has repudiated the agreement. In truth, the Respondent has simply taken the position that three grievances are not arbitrable.

Dated, Washington, D.C. September 29, 2003

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Robert J. Battista, Chairman

NATIONAL LABOR RELATIONS BOARD
APPENDIX

NOTICE TO EMPLOYEES
MAILED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail to comply with the collective-bargaining agreement with the Union by refusing to bring to arbitration the grievances filed by the Union.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL submit the grievances filed by the Union, described herein to arbitration and select arbitrators pursuant to the terms of the parties' collective-bargaining agreement.

EXXON CHEMICAL COMPANY

Brian Monroe, Esq. and *Richard E. Fox, Esq.*, for the General Counsel.
Charles Beck, Esq., for the Respondent.
David Grossman, Esq. (Schneider, Goldberger, Cohen, Finn, Solomon, Ceder & Montalbano), for the Charging Party.

DECISION

STATEMENT OF THE CASE

HOWARD EDELMAN, Administrative Law Judge. This case was tried before me on November 14, 2000, and January 22, 2001, at Newark, New Jersey.

A complaint issued on January 13, 2000, alleging that Exxon Chemical Company (Respondent) violated Section 8(a)(1) and (5) of the Act by refusing to arbitrate grievances filed by Local 877 International Brotherhood of Teamsters AFL–CIO (the Union) with whom it had a collective-bargaining agreement.

Based on the entire record in this case, including my observation of the demeanor of the witnesses and a full consideration of briefs filed by counsel for the General Counsel, counsel for the Union, and counsel for Respondent, I make the following

FINDINGS OF FACT

Respondent is a corporation with an office and place of business in Linden, New Jersey, where it is engaged in the manufacture, sale, and distribution of chemical products. In the normal course of its usual business operations, Respondent sells and ships from its New Jersey facility goods valued in excess of $50,000 directly to points outside the State of New Jersey. It is admitted that Respondent is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

[2] *Velan Valve Corp.*, 316 NLRB 1273 (1995); *Indiana & Michigan Electric Co.*, 284 NLRB 53 (1987); and *Mid-American Milling Co.*, 282 NLRB 926 (1987).

It is also admitted that the Union is a labor organization within the meaning or Section 2(5) of the Act.

The Union and Respondent were parties to a long series of collective-bargaining agreements covering a unit of:

> All operating, mechanical and maintenance employees in the Bayway Chemical Plant of the Company, excluding office and plant clerical employees, watchpersons, guards, professional employees, technical employees, metal inspectors, gas lasters, measurement persons, and supervisors as defined in the National Labor Relations Act.

The last agreement was effective March 2, 1996, and expired June 1, 1999. The collective-bargaining agreement contained a grievance-arbitration provision.

Pursuant to the arbitration provision, the board of arbitration was to consist of three members, one chosen by the Union, one chosen by Respondent, and a third by an impartial arbitrator. Pursuant to article 21, section 21–4 of the arbitration provision, the parties agreed to a panel of 10 third-party neutral arbitrators. When a grievance was submitted to arbitration, Respondent and the Union were to designate a third-party neutral arbitrator from the panel of arbitrators.

On or about July 12, 1996, Respondent made an announcement concerning the formation of a joint venture with Shell Oil, an international oil and gasoline corporation.

The mechanical department head and plant manager of Respondent went around in the plant to discuss the joint venture with the unit employees. The mechanics and process technicians were told that Respondent's operation was going to be sold and there would be a new company and that Respondent's involvement would come to an end.

After this announcement, the Union requested information from Respondent concerning the joint venture and also requested effects bargaining.

During the period of July 12, 1996, through October 1998, the Union filed numerous unfair labor practice charges against Respondent and filed numerous grievances, all relating to the formation of the joint venture. A settlement agreement was eventually signed on November 24, 1998. However, that settlement only pertained to the outstanding grievances and unfair labor practice charges existing at that time.

There was no discussion during the effects bargaining with Respondent about terminating the grievance and arbitration procedures in the present collective-bargaining agreement. No document was generated as a result of the effects bargaining that terminated the 1996–1999 collective-bargaining agreement between Local 877 and Respondent on December 31, 1998.

The last date that Respondent operated at its Linden, New Jersey facility was December 31, 1998. On December 31, 1998, the employees received their last paychecks from Respondent.

On December 31, 1998, the employees noticed that Respondent had failed to match a contractually required 6-percent contribution for the employees' "Thrift fund" based on their severance pay, which was given to them on December 31, 1998.

Also, on December 31, 1998, Respondent unilaterally transferred the Exxon thrift fund to the Infineum thrift fund.

Article 5 of the Respondents collective-bargaining agreement with the Union specifically requires that the Union has a right to bargain concerning Respondent's programs, including the "Thrift Plan."

Article 33, paragraph 33–34 of the parties agreement, which talks about the notice required to be given in the case of a layoff requires that when an employee is to be laid off, the employees will receive 6 months' notice. On December 31, 1998, the Union noticed that Respondent had failed to give the employees the 6-month notice prior to their layoff and failed to pay them due to their failure to give the proper notice.

Albert DeFreece, a union trustee and chief spokesman for the Union with regard to Respondent testified it was normal for the Union to file grievances regarding perceived violations of collective-bargaining agreement.

DeFreece also testified that while the issue of the thrift contribution on the severance was discussed during the effects bargaining, described above, there was no discussion concerning the notice of layoff, or the transfer of the thrift plan to Infineum.

On or about January 29, 1999, DeFreece had a telephone conversation with William Goodhart, the labor relations manager for Respondent, putting him on notice that the Union was going to file three grievances concerning the above-referenced perceived violations of the collective-bargaining agreement. Goodhart told DeFreece to send them in and he would look at them. Goodhart did not question the timeliness of the grievances.

Goodhart testified that he told DeFreece that he would not hear the grievances, and did not agree to accept them. He also testified that he did not agree to arbitrate these three grievances.

Based on a comparison of demeanor and the written communications between the Union and Respondent set forth below, I credit DeFreece's testimony.

By letter dated January 30, 1999, DeFreece sent Goodhart a letter with the three grievances arising under the collective-bargaining agreement. The letter sets forth as follows:

> Pursuant to our phone conversation on January, 1999, this letter will serve to document the content of that conversation of which Local 877 initialized grievances to the following three (3) occurrences:
>
> First, Teamster's Local 877 (the Union) is grieving the action of Exxon Chemical Company (the Company) for its failure to match the severance pay amount within the pay period that was received on December 31, 1998. Also, the severance amount that was placed in escrow accounts of those employees who resigned or retired were not matched.
>
> Second, the Union is grieving the Company's proposed decision to transfer Exxon Thrift fund accounts of those former Exxon employees who have accepted employment or are employed with INFINEUM USA Inc.
>
> Finally, the Union is grieving the Company's application of Article 33 specific to six months Notice of Layoff. The Company gave improper notice; not in accordance to the contract.

> Please respond promptly in order to facilitate the proper process for settlement of these grievances. Thank you for your attention to these matters.

Goodhart did not respond to this letter.

In view of Respondent's failure to respond and to the Union's January 30 letter, DeFreece sent Goodhart a second letter dated March 26. This letter restated the three grievances and requested Respondent contract the Union for the purpose of selecting arbitrators.

Respondent, by a letter from Goodhart dated April 29, 1999, to the Union simply alleged that the grievances were untimely. The letter did not indicate Respondent's position that they did not consider the three grievances to be grievances covered under the collective-bargaining agreement, nor did it indicate the Respondent would not arbitrate the three grievances.

By letter dated May 12, 1999, DeFreece sent to Goodhart three letters indicating that the Union was formally requesting arbitration concerning the three grievances, and was requesting Respondent to meet to designate an arbitrator from the permanent panel of arbitrators pursuant to the arbitration provision of their agreement. Respondent has failed and refused to meet with the Union for the purpose of designating an arbitrator for the three grievances. Respondent did not, advise the Union as to why it was refusing to meet and designate an arbitrator.

Counsel for the Union then submitted the three above-described grievances to arbitration pursuant to the rules of the American Arbitration Association.

It was only after the submission of the three grievances to arbitration pursuant to the rules of the American Arbitration Association that Respondent indicated in letters dated July 2, 6, and 26, 1999, that it was their position that these grievances were not arbitrable. Respondent also indicated to the American Arbitration Association that pursuant to the arbitration provision of the collective-bargaining agreement there was a method by which an arbitrator could be designated, and that the American Arbitration Association did not have jurisdiction over these grievances.

By letter dated August 2, 1999, counsel for the Union wrote to Respondent to request the designation of an arbitrator from the panel of arbitrators per the arbitration provision of the collective-bargaining agreement. It was Respondent's position from that point, to date, that the grievances were not arbitrable. By a letter dated August 10, 1999, Respondent refused again to designate an arbitrator. Respondent has at all times thereafter refused to designate an arbitrator from the panel of arbitrators per the arbitration provision of the collective-bargaining agreement. The Union thereafter filed the instant unfair labor practice charges.

ANALYSIS

Respondent's defense to allegations of the instant complaint are essentially that the grievances were discussed and settled during the effects bargaining, described above, and thus the grievances are without merit, not timely, and that the Union had waived its right to arbitrate.

I conclude that Respondent's reasons for refusing to arbitrate the grievances establish Respondent's bad faith and improper repudiation of the collective-bargaining agreement because these issues regarding the merits of a grievance, the timeliness of the filing of a grievance, and argument of waiver and/or estoppel, are issues to be resolved by an arbitrator, and not by the Board.

There are numerous Board cases, which are analogous to this case, which establish that an employer's refusal to designate an arbitrator pursuant the procedures set forth in a collective-bargaining agreement, and its refusal to arbitrate the underlying grievances, constitutes a violation of Section 8(a) (1) and (5) of the Act.

In *Beverly Farm Foundation, Inc.*, 323 NLRB 787, 796 (1997), the employer rejected the union's request to submit grievances to mediation as the final step in the grievance procedure. The Board found by refusing to proceed to mediation, the employer had altered a condition of employment, and thereby violated Section 8(a)(1) and (5). Id.

In *McDaniel Ford*, 322 NLRB 956 (1997), the collective-bargaining agreement between the parties contained a grievance and arbitration clause, and if a grievance could not be resolved, it would be submitted to an arbitrator selected by mutual consent. Id. at 958. The union submitted a grievance and suggested that their parties use a permanent arbitrator used by the Automobile Dealers Industrial Association or an arbitrator designated by the American Arbitration Association, the New York State Employment Relations Board, the New Jersey State Board of Mediation of the Connecticut Board of Mediation and Conciliation. Id. at 960–961. The company refused to utilize any of the above agencies, and instead insisted that the arbitrator be one of several named attorneys. Id.

The Board found that the Employer's actions could reasonably be viewed as an attempt to avoid its obligation to select an arbitrator and to impede the arbitration process. Id. at 965. The Board found that the Employer had violated Section 8(a)(1) and (5) of the Act. Id., citing, *Richmond Convalescent Hospital*, 313 NLRB 1247, 1258–1259 (1994); *Independent Stove Co.*, 248 NLRB 219, 227 (1980); and *South Florida Hotel & Motel Assn.*, 245 NLRB 561, 609–609 (1979).

In the instant case, the facts establish that after Goodhart's letter dated April 29, 1999, in which he advised DeFreece that the grievances were untimely, DeFreece sent letters dated May 21, 1999, requesting arbitration, and requesting the Company meet to designate an arbitrator from the panel of arbitrators. The Union then attempted to obtain the designation of an arbitrator from the American Arbitration Association (AAA). It was then, by letter dated July 2, 1999, Respondent indicated its position that the grievances were not arbitrable and thwarted the union efforts to obtain the designation of an arbitrator by the AAA. By letter dated August 2, 1999, counsel for the Union offered to have appointed arbitrators from the panel to adjudicate the grievances per the arbitration provision. By letter dated August 10, 1999, Respondent refused again to designate an arbitrator.

The issues raised by the grievances are clearly covered by the grievance-arbitration provisions under the collective-bargaining agreement. There is no exclusion from arbitration. I conclude and find that Respondent has engaged in bad-faith bargaining and has repudiated the terms of the grievance–arbitration provisions of its collective-bargaining agreement in

violation of Section 8(a)(1) and (5) by its refusal to designate an arbitrator and by its refusal to arbitrate the grievances filed.

It is clear that the issues raised by the union grievances were covered by the terms of the grievance-arbitration provisions of the last collective-bargaining agreement between the parties which by its terms expired on June 1, 1999.

Respondent ceased operations at its New Jersey facility on December 31, 1998. However, during their effects bargaining, the Union and Respondent did not enter into an agreement, which terminated the 1996–1999 collective-bargaining agreement. The grievances filed related to and arose out of that collective-bargaining agreement, and matured on December 31, 1998. The fact that the grievances were filed after the Company ceased operations does not end the Company's obligation to arbitrate the grievances nor does it make the filing untimely, as contended by Respondent. See *Nolde Bros. v. Bakery Workers Local 358*, 430 U.S. 243 (1977): *Richmond Convalescent Hospital*, supra, 313 NLRB at 1259.

Respondent contends that the grievances were discussed and resolved during the effects bargaining described above. To establish this contention Respondent placed in the rejected exhibit file 40 voluminous exhibits. Respondent contends that I, and the Board, should consider and determine the merits of the Union's grievances. However, the Board and the courts have consistently held that this is not an issue to be decided by the Board. *Lukens Steel Co. v. Steelworkers*, 989 F.2d. 668, 672 (3d Cir. 1992); *E.M. Diagnostic System Inc. v. Teamsters Local 169*, 812 F. 2d 91, 94 (3d Cir. 1987); *Ladies Garment Workers v. Ashland Industries*, 488 F.2d 641 (5th Cir.), cert. denied 419 U.S. 840 (1974).

Respondent also contends that the grievances were not timely filed under the terms of their collective-bargaining agreement and that the Union waived its right to file such grievances and should be estopped therefrom.

The issue of timeliness in the Union submitting a grievance is a procedural question reserved for the arbitrator. *Arkla Inc. Entex Division v. Oil Workers Local 4-227*, 147 LRRM 2607, 2610 (S.D. Tex 1993) (citation omitted).

Issues of waiver and estoppel are also determined by the arbitrator. *Bakery Workers v. National Biscuit Co.*, 378 F.2d 918 (3d Cir. 1967).

Respondent also contends that the instant unfair labor practice charge, which led to the issuance of this complaint was not timely filed within the provisions of Section 10(b) of the Act.

The 1947 Taft-Hartley amendments Section 10(b) state that the Board shall not issue a complaint "based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board."

In *Leach Corp.*, 312 NLRB 990 (1993), enfd. 54 F.3d 802 (D.C. Cir. 1995), the Board reaffirmed its position that the statute of limitations does not begin to run until "a party has clear and unequivocal notice of a violation of the Act." The issue in *Leach* was whether the 6-month limitations period commenced when the employer gave the union advance notice of its intent not to apply the parties' collective-bargaining agreement to its new facility. The Board determined that, for purposes of the union's charge alleging that the employer had unlawfully repudiated the collective-bargaining agreement after gradually transferring operations from its unionized facility to its nonunionized facility, the limitations period began to run when the relocation of the operations was "substantially completed" rather than when advance notice was given to the union by the employer or when the first employees began working at the nonunion plant.

The first notice the Union had that Respondent objected to the grievances was by its letter dated April 29, 1999.

The first time Respondent asserted that the grievances were not arbitrable was by letter dated July 2, 1999.

The unfair labor practice charge was filed August 31, 1999, well within the 6-month period from the April 29, 1999 letter. I conclude these charges were filed within the 10(b) period.

CONCLUSIONS OF LAW

1. Exxon Chemical Company is an employer engaged in commerce within the meaning of the Section 2(2), (6), and (7) of the Act.

2. Local 877, International Brotherhood of Teamsters is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent and the Union were at all times material, parties to a collective-bargaining agreement covering the following unit of employees:

> All operating, mechanical and maintenance employees in the Bayway Chemical Plant of the Company, excluding office and plant clerical employees, watchpersons, guards, professional employees, technical employees, metal inspectors, gas lasters, measurement persons, and supervisors as defined in the National Labor Relations Act.

4. By refusing to select an arbitrator and refusing to proceed to arbitration concerning grievances filed by the Union and covered by the grievances-arbitration provisions of their collective-bargaining agreement. Respondent has violated Section 8(a)(1) and (5) of the Act.

REMEDY

Having found Respondent violated Section 8(a)(1) and (5) of the Act, I shall recommend it be ordered to cease and desist therefrom and to take certain affirmative action to effectuate the policies of the Act.

On these findings of fact and conclusions of law and the entire record, I shall issue the following recommended[1]

ORDER

The Respondent, Exxon Chemical Company, Newark, New Jersey, it officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to follow the procedures required in the collective bargaining with the Union, to bring arbitration, the grievances filed by the Union.

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[1] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) In any like or related matter interfering, restraining, or coercing its employees in the exercise of the rights guaranteed them by the Section 7 of the Act.

2. Take the following action necessary to effectuate the policies of the Act.

(a) Submit the grievances filed by the Union, described herein to arbitration and select arbitrators pursuant to the terms of the parties collective-bargaining agreement, described herein

(b) Within 14 days after service by the Region, post at its Linden, New Jersey facility, and other appropriate facilities copies of the attached notice marked "Appendix."[2] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 2, 1999.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. March 28, 2001

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

WE WILL NOT refuse to follow the procedures required in the collective bargaining with the Union, and to bring to arbitration, the grievances filed by the Union.

WE WILL NOT in any like or related matter interfere, restrain, or coerce our employees in the exercise of their rights guaranteed them by Section 7 of the Act.

WE WILL submit the grievances filed by the Union, described herein to arbitration and select arbitrators pursuant to the terms of the parties collective-bargaining agreement.

EXXON CHEMICAL COMPANY

[2] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."